83-1502

FILED
MAR 12 1984
ALEXANDER L. STEVAS
CLERK

IN THE

Supreme Court of The United States

OCTOBER TERM, 1983

SELDON B. GRAHAM, JR.,

Petitioner,

v.

THREE OR MORE MEMBERS OF THE SIX MEMBER ARMY RESERVE GENERAL OFFICER SELECTION BOARD OF 30 NOVEMBER 1979, THE SECRETARY OF THE ARMY, AND THE UNITED STATES OF AMERICA REPRESENTED BY THE SECRETARY OF THE ARMY,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

SELDON B. GRAHAM, JR.
14303 Broadgreen
Houston, Texas 77079
(713) 497-3700

Petitioner

March 12, 1984

QUESTIONS PRESENTED

The questions presented are:

1. Whether Army generals will be allowed by federal courts to disobey higher civilian authority with impunity, and, also, to act in bad faith with impunity.
2. Whether judicial review is of facts as the court guesses them to be or of actual facts.
3. Whether Petitioner, an innocent victim, is to be denied a jury, denied a trial, denied a hearing, and denied an oral argument under the Constitution of the United States.

PARTIES TO THE PROCEEDINGS

Petitioner is Seldon B. Graham, Jr.

Respondents are Robert D. Bay, a reserve general; Russell I. Berry, a reserve general; Ladd F. Hunt, a reserve general; Major General James A. Johnson; Major General James C. Smith; Lieutenant General Harold F. Hardin; Clifford Alexander, Jr., former Secretary of the Army; and John O. Marsh, Secretary of the Army.

Respondents' attorney is Robert W. Rodrigues, Assistant United States Attorney, P.O. Box 61129, Houston, Texas 77208.

TABLE OF CONTENTS

	Page
Questions Presented	i
Parties to the Proceedings	i
Table of Contents	ii
Table of Authorities	iii
Opinions and Orders Below	1
Jurisdiction	2
Statutes and Regulations Involved	2
Statement	2
Summary of Reasons for Granting the Petition	7
Reasons for Granting the Petition	7
Conclusion	8
Appendix	A-1

TABLE OF AUTHORITIES

Page

Cases

Burnaman v. Bay City Ind. Sch. Dist., 445 F.Supp. 927 (D.C.,S.D.Tex.1978) 5

Dennis v. S. & S. Consolidated Rural H. S. Dist., 557 F.2d 338 (5th Cir. 1978) 4

Heidman v. United States, 414 F.Supp. 47 (D.C.,N.D.OH. 1976) 5, 7

Wilkes v. Dinsman, 48 U.S. 618 (1849) 4

Zimmerer v. Spencer, 485 F.2d 176 (5th Cir. 1973) 3

Statutes

10 U.S.C. § 277 2

10 U.S.C. § 1182(b) 2

Regulations

32 C.F.R. § 102.2(b) 2

Army Regulation 135-156, Paragraph 3-1c 2

In The

Supreme Court of The United States

October Term, 1983

Seldon B. Graham, Jr.,

Petitioner,

v.

Three or More Members of the Six Member Army Reserve General Officer Selection Board of 30 November 1979, the Secretary of the Army, and the United States of America Represented by the Secretary of the Army,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

Seldon B. Graham, Jr. petitions for a writ of certiorari to review the December 16, 1983, decision of the United States Court of Appeals for the Fifth Circuit in this case.

OPINIONS AND ORDERS BELOW

The decision of the United States Court of Appeals for the Fifth Circuit is found in the Appendix. The decision of the United States District Court for the Southern District of Texas is found at 556 F.Supp. 669.

JURISDICTION

A petition for rehearing was denied by the Court of Appeals on January 11, 1984. Judgment of the Court of Appeals was issued as mandate on January 23, 1984.

The jurisdiction of this Court is invoked pursuant to 28 U.S.C. § 1254(1).

STATUTES AND REGULATIONS INVOLVED

The equal protection statutes ignored by the Court of Appeals are 10 U.S.C. § 277 and 10 U.S.C. § 1182(b). The discrimination among reservists regulation, not challenged by Petitioner, but merely illustrative of the fact that Petitioner had not been in the same class of reserve officers as Respondent reserve officers, is 32 C.F.R. § 102.2(b). This case is about an "individual" reservist who was eliminated by "selected" reservists. The waiver for truly outstanding officers, which Petitioner had been given but which was not in Petitioner's record, is required under Army Regulation 135-156, Par. 3-1c.

STATEMENT

This case is simple. It is a case in which the following are present:

(1) Malice

(2) Violation of Constitutional Rights

(3) Disputed Facts

(4) A cause of action against individual Respondents and also a cause of action against the United States

(5) A demand by Petitioner for Jury Trial

(6) No Jury

(7) No Trial Without Jury

(8) Judgment denying Petitioner's Right to Trial by Jury

(9) Judgment denying Petitioner's Right to Trial Without Jury

(10) Judgment denying Petitioner's Right to a judicial review on the true facts

(11) No undisputed facts or other evidence to support the Judgment

Petitioner's case is unrecognizable from the erroneous facts found in the opinion of the Court of Appeals, mercifully not published at 723 F.2d 905.

The Court of Appeals decision states that the court declines "to second-guess the Selection Board's reasons for selecting a candidate other that Graham for promotion". The Selection Board did not select a candidate other than Graham for promotion to Graham's position. The Selection Board's reasons for selecting a candidate other than Graham has never been an issue in this case. The "facts" provided by the Court of Appeals simply have nothing to do with this case.

The Court of Appeals decision states that "he (Petitioner) had missed drills". There are no drills. Mobilization designees such as Petitioner do not have drills. The "facts" provided by the Court of Appeals simply have nothing to do with this case.

The Court of Appeals is using its own imaginary facts to review Petitioner's case.

The Court of Appeals can only speculate as to the facts Petitioner has to prove a "probationary policy" under the rule in *Zimmerer* v. *Spencer*, 485 F.2d 176 (5th Cir. 1973). The Court of Appeals speculates that Petitioner has little

or no facts; yet, Petitioner has substantial facts. Thus, the Court of Appeals speculates Petitioner out of his property rights.

The Court of Appeals can only speculate as to the facts Petitioner has to prove "serious damage to his standing and associations in his community" under the rule in *Dennis* v. *S. & S. Consolidated Rural H. S. Dist.*, 557 F.2d 338 (5th Cir. 1978). The Court of Appeals speculates that Petitioner has little or no facts; yet, Petitioner has substantial facts. Thus, the Court of Appeals speculates Petitioner out of his liberty rights.

The Court of Appeals can only speculate as to the facts Petitioner has to prove malice preventing immunity of Respondents from personal liability. See *Wilkes* v. *Dinsman*, 48 U.S. 618 (1849) at 636. The Court of Appeals speculates that Petitioner has little or no facts; yet, Petitioner has substantial facts. Thus, the Court of Appeals speculates Petitioner out of his rights to discovery and to a trial.

This judicial review is not on Petitioner's case. It is on guesses. (And very poor guesses at that.)

The gravamen of this case is the Board's finding. Many disputed facts center around this finding.

A disputed fact with National Security implications is whether the generals on the Board obeyed legal written orders from higher civilian authority. This case can be called the

"REVOLT OF THE GENERALS" case.

Other disputed facts are whether the finding was specific, whether the finding was false, and whether the finding was supported by evidence. The seriousness of these disputed facts has not been grasped by the courts.

The 6 generals on the Selection Board were instructed by the Secretary of the Army in writing to make a finding of specific deficiency. A finding of a specific deficiency means a finding of a specific fact. See *Heidman* v. *United States*, 414 F.Supp. 47 (N.D. OH. 1976).

The selection board in *Heidman*, supra, made a finding that Colonel Heidman lacked a college degree. Now that is a specific fact.

Respondents' finding was vague, general and patently artificial. See *Burnaman* v. *Bay City Ind. Sch. Dist.*, 445 F.Supp. 927 (D.C.,S.D.Tex. 1978). The stated reasons were a pretext. See *Burnaman*, supra.

Petitioner was an infantry colonel in the Army Reserve and is a graduate of the Infantry Officer Candidate School, the United States Military Academy at West Point, the Army Command and General Staff College, the Industrial College of the Armed Forces, the Air War College, and the Army War College. Petitioner was on active duty for 5 years, most of which was in Europe and Korea. Every officer in Petitioner's chain of command, up to and including

the Chief of Staff, had nominated or recommended Petitioner to be a brigadier general. Petitioner received perfect scores on Officer Evaluation Reports (Army slang: "max OER's") in his own general officer position in the Pentagon and as Deputy Assistant Commanding General of the 101st Airborne (Air Assault) Division at Fort Campbell, Kentucky. Yet, the Board's finding was that Petitioner's *RECORD* did not reflect the professional qualifications and leadership required for promotion. Coming from Respondents, not all of whom could pass the *Heidman* test, the finding is not credible.

The reason the finding is an unsupported general conclusion is because the finding is the *COMPROMISE* of a *SPLIT* board. It should be remembered that a majority is required for a finding.

Here, it should be noted that the Court of Appeals ignored the significant fact that a subsequent selection board, convened after Petitioner's discharge, found the waiver missing from Petitioner's *RECORD* to be a specific deficiency in Petitioner's case.

To Petitioner, the only satisfying result of this experience has been the rush of generals volunteering their support to Petitioner, some of whom have also volunteered to appear as a witness on Petitioner's behalf. There comes a time to man the ramparts.

The question is whether generals can act in bad faith *with impunity* and also disobey legal written orders of higher civilian authority *with impunity.*

If the Supreme Court of the United States says yes, this Old Republic is in trouble. There is a Duty to our Country to try to prevent this from happening.

SUMMARY OF REASONS FOR GRANTING THE PETITION

According to fundamental concepts of American justice and fair play, it is the only thing to do.

REASONS FOR GRANTING THE PETITION

In time of war, America has always relied on citizen soldiers. They are a valuable resource in our national defense. Court decisions that impact on citizen soldiers also impact on our national defense posture. The decision in this case is such a vital national defense decision.

This is a case of first impression in many respects. It is unique. It is one of a kind. This fact situation will never again be available to this Court, if petition is not granted.

If petition is not granted, there is little doubt that this case will be cited in the future to support military disobedience. If petition is not granted, it will send a signal to generals that they can get by with most anything.

If petition is not granted, the Deputy Chief of Staff for Personnel will probably stop reminding selection boards to be sure to have a specific basis for their action. (This case appears to have done some temporary good at least.) There never has been much question about what the word "specific" means. See, *Heidman*, supra.

Error was done by the Court of Appeals. Proper development of law requires the questions posed be answered. The law itself will suffer if the questions remain undecided. There will be undue hardship and confusion if the questions remain unanswered.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted.

Respectfully submitted,

SELDON B. GRAHAM, JR.
14303 Broadgreen
Houston, Texas 77079
(713) 497-3700

March 12, 1984

In The

Supreme Court of The United States

October Term, 1983

Seldon B. Graham, Jr.,

Petitioner,

v.

Three or More Members of the Six Member Army Reserve General Officer Selection Board of 30 November 1979, the Secretary of the Army, and the United States of America Represented by the Secretary of the Army,

Respondents.

APPENDIX TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

Seldon B. Graham, Jr.
14303 Broadgreen
Houston, Texas 77079
(713) 497-3700

Petitioner

IN THE

United States Court of Appeals
For The Fifth Circuit

No. 83-2223
SUMMARY CALENDAR

SELDON B. GRAHAM, JR.,
Plaintiff-Appellant,

VERSUS

THREE OR MORE MEMBERS OF THE SIX MEMBER ARMY RESERVE GENERAL OFFICER SELECTION BOARD OF NOVEMBER 1979, *et al.*,
Defendants-Appellees.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF TEXAS

(DECEMBER 16, 1983)

Before REAVLEY, RANDALL and WILLIAMS, Circuit Judges.

PER CURIAM:

Appellant Seldon B. Graham, Jr., a colonel in the United States Army Reserve (USAR), was recommended for but did not receive a promotion to the rank of Reserve brigadier general. Upon expiration of thirty years and thirty days of service, Graham was therefore transferred to the Retired Reserve pursuant to his application under U.S.C. § 3851(a). He filed this action in January 1982 against several individual officers, the Secretary of the Army, and

the United States, claiming that the decision not to promote him infringed his rights to due process and equal protection. The district court held for defendants on cross-motions for summary judgment. We affirm.

I. Due Process Claims

Graham first claims that he had a protected property right to receive the promotion for which he had been recommended.[1] A property interest protected by the Due Process Clause must be more than a personal expectation of benefit; rather, it must stem from provisions of statute, regulation, or specific arangement "that secure certain benefits and that support claims of entitlement to those benefits." *Board of Regents* v. *Roth*, 408 U.S. 564, 577, 92 S.Ct. 2701, 2709 (1972); *see Perry* v. *Sindermann*, 408 U.S. 593, 92 S.Ct. (1972). Graham does not claim a protected entitlement to continued employment in the Reserves. 10 U.S.C. § 162(a); *Sims* v. *Fox*, 505 F.2d 857, 861 (5th Cir. 1974). Instead, he argues that his interest in promotion to Reserve brigadier general had sufficient foundation to qualify for due process protection. Had he been promoted, Graham would not have been forced to retire for another five years. 10 U.S.C. § 3851(a).

This case does not present circumstances sufficient to create a protected property interest. Neither Graham's previous record nor the existence of a highly competitive selection procedure is sufficient to instill in each presumably exemplary officer candidate a protected right to be promoted to Reserve brigadier general. Praise from senior officers and positive Officer Evaluation Reports, however important, *cf. Johnson* v. *Reed*, 609 F.2d 784, 787 (5th Cir.

---

[1] Such a claim is among those reviewable by a federal court despite *Mindes* v. *Seaman*, 453 F.2d 197 (5th Cir. 1971). *See Sims* v. *Fox*, 505 F.2d 857 (5th Cir. 1974).

1980), created nothing more than a subjective expectation of promotion outside the scope of the Due Process Clause. Moreover, the period of probation that may follow denial of promotion does not transform the promotion process into a *de facto* tenure system. Probation is granted not in every case, but only on recommendation of the Army Reserve Officer Selection Board in those cases calling for a period of retraining. Ex. 3 at 47. *Cf. Zimmerer* v. *Spencer*, 485 F.2d 176 (5th Cir. 1973) (automatic one-year probation for nonrenewed teachers among factors leading to finding of "constructive tenure").

Plaintiff also failed to show the sort of injury to reputation necessary to trigger the protections of due process. Graham does not claim that the Army disseminated derogatory information about him. Instead, the sole injury to reputation asserted in this case is the allegedly stigmatizing effect of nonpromotion communicated by the simple fact that Graham was transferred to Retired Reserves. Although Graham denies that he lacks "the professional qualifications and leadership required for promotion to general officer," we cannot conclude that plaintiff's reputation was injured in a constitutionally significant way by the Army's decision not to promote him to higher rank. *See Paul* v. *Davis*, 424 U.S. 693, 96 S.Ct. 1155 (1974); *Bishop* v. *Wood*, 426 U.S. 341, 347-50, 96 S.Ct. 2074, 2079-80 (1976); *Sims*, 505 F.2d at 862-64 (discharge case). Nor does Graham's inability to secure other employment as an "infantry colonel" create a protected liberty interest; the Army's salutary monopoly on military employment does not transform every discharge and failure to promote into a constitutional case. The Army did nothing to frustrate this retired colonel's ability to retain or secure employment. His liberty interest was therefore not infringed.

II. Equal Protection

Graham argues that the Selection Board discriminated against him because he lacked command experience (ordinarily a requirement for the promotion in question, but waived in this case) and because he had missed drills while exercising his right to travel. We agree with the district court that the defendants cannot be deemed to have admitted that all members of the Selection Board voted to recommend promotion. Following the teaching of *Mindes*, however, we decline to second-guess the Selection Board's reasons for selecting a candidate other than Graham for promotion. *See Woodward* v. *Marsh*, 658 F.2d 989, 992-95 (5th Cir. 1981).[2]

CONCLUSION

We have reviewed the record and find no merit to Graham's other claims, including that relating to the absence from his promotion file of the waiver of command experience. In light of our rejection of the constitutional claims we find no reason to consider the question of the individual defendants' immunity. The judgment of the district court is AFFIRMED.

---

[2] Like the *Woodward* court, we note that Graham asserts no claim of race, religion or gender discrimination. 658 F.2d at 994 n.5. We also agree with the district court that Graham has demonstrated no standing to assert that his nonpromotion was rooted in his exercise of the right to travel. Order (March 31, 1983) at 5-6, R. 8-9.

FILED
MAR 16 1984
ALEXANDER L. STEVAS,
CLERK

No. 83-1502

IN THE

Supreme Court of The United States

OCTOBER TERM, 1983

SELDON B. GRAHAM, JR.,

Petitioner,

v.

THREE OR MORE MEMBERS OF THE SIX MEMBER ARMY RESERVE GENERAL OFFICER SELECTION BOARD AND THE UNITED STATES OF AMERICA REPRESENTED BY THE SECRETARY OF THE ARMY,

Respondents.

SUPPLEMENTAL APPENDICES TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

SELDON B. GRAHAM, JR.
14303 Broadgreen
Houston, Texas 77079
(713) 497-3700
Petitioner

March 12, 1984

Office - Supreme Court U.S.
FILED
MAR 16 1984
ALEXANDER L. STEVAS,
CLERK

SUPPLEMENTAL APPENDICES
TABLE OF CONTENTS

	Page
Court of Appeals Judgment	S-1
Court of Appeals Order on Petition for Rehearing	S-2
District Court Memorandum and Order	S-3
District Court Final Judgment	S-12
District Court Order on Motion to Alter or Amend Judgment	S-13

IN THE

United States Court of Appeals

FOR THE FIFTH CIRCUIT

No. 83-2223

SUMMARY CALENDAR

D. C. DOCKET No. CA-H-82-0063

SELDON B. GRAHAM, JR.,

Plaintiff-Appellant,

VERSUS

THREE OR MORE MEMBERS OF THE SIX MEMBER ARMY RESERVE GENERAL OFFICER SELECTION BOARD OF 30 NOVEMBER 1979, et al.,

Defendants-Appellees.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF TEXAS

Before REAVLEY, RANDALL and WILLIAMS, Circuit Judges.

JUDGMENT

This cause came on to be heard on the record on appeal and was taken under submission by the Court upon the record and briefs on file, pursuant to Rule 34;

ON CONSIDERATION WHEREOF, It is now here ordered and adjudged by this Court that the judgment of the said District Court in this cause be, and the same is hereby, affirmed;

IT IS FURTHER ORDERED that plaintiff-appellant pay to defendants-appellees, the costs on appeal to be taxed by the Clerk of this Court.

December 16, 1983

Issued as Mandate: January 23, 1984

S-2

IN THE

United States Court of Appeals

FOR THE FIFTH CIRCUIT

No. 83-2223
SUMMARY CALENDAR

SELDON B. GRAHAM, JR.,

Plaintiff-Appellant,

VERSUS

THREE OR MORE MEMBERS OF THE SIX MEMBER ARMY RESERVE GENERAL OFFICER SELECTION BOARD OF 30 NOVEMBER 1979, et al.,

Defendants-Appellees.

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS

ON PETITION FOR REHEARING

(JAN 11 1984)

Before REAVLEY, RANDALL and WILLIAMS, Circuit Judges.

PER CURIAM:

IT IS ORDERED THAT the petition for rehearing filed in the above entitled and numbered cause be and the same is hereby denied.

ENTERED FOR THE COURT:

THOMAS M. REAVLEY
United States Circuit Judge

S-3

IN THE

UNITED STATES DISTRICT COURT

FOR THE SOUTHERN DISTRICT OF TEXAS

HOUSTON DIVISION

SELDON B. GRAHAM, JR., *Plaintiff,* v. THREE OR MORE MEMBERS OF THE SIX MEMBER ARMY RESERVE GENERAL OFFICER SELECTION BOARD OF 30 NOVEMBER 1979, THE SECRETARY OF THE ARMY, AND THE UNITED STATES OF AMERICA REPRESENTED BY THE SECRETARY OF THE ARMY, *Defendants.*	CIVIL ACTION No. H-82-0063

Seldon B. Graham, Jr., Pro Se, Houston, Texas.

Jose Berlanga, Houston, Texas Attorney for Defendants.

February 8, 1983

MEMORANDUM AND ORDER

Pending before the Court are Plaintiff's and Defendants' counter-motions for summary judgment. This is a suit by a retired Colonel of the Army Reserve wherein he alleges that he was improperly denied promotion to the rank of brigadier general.

In November, 1979, Plaintiff was considered for promotion by the Reserve General Officer Board of the Army (Board), but was not selected. One month later he was transferred to the Retired Reserve since the Secretary of the Army acting on the Board's recommendation "had

refused [Plaintiff's] appointment to the next higher grade." *See* 10 U.S.C. § 3851(b). Following this Court's Order of January 12, 1981, in Civil Action No. H-80-1321, Plaintiff exhausted his administrative remedies by applying for relief without success to the Army Board for Correction of Military Records.

After the Correction Board's decision, Plaintiff has essentially refiled his earlier suit. He claims that the Army's actions in this matter have been arbitrary and capricious, and have deprived him of property and liberty without due process of law in violation of the Fifth Amendment of the United States Constitution.

At the outset it is worthwhile to note that although Plaintiff is represented pro se, public records indicate that he is a member of the State Bar of Texas (Texas Bar No. 08284000). Accordingly, his pleadings and arguments are entitled to only the same treatment and deference given to the work of all lawyers who are admitted to the bar.

As a second preliminary matter the Court finds that Plaintiff's requests for admission filed on November 24, 1980, in Civil Action No. H-80-1321 are not deemed admitted by operation of Rule 36, Fed.R.Civ.P. Defendants timely filed on November 26, 1980, a motion to stay the application of Rule 36. It would be extremely inequitable and disruptive of judicial proceedings to permit the Rule to operate during the pendency of a motion to stay that very operation. The Court holds that the requests could not be deemed admitted before the motion to stay was decided by the Court's Order of January 12, 1981. After that date the case was dismissed and the Rule could not apply in a cause which was no longer before the District Court. If Plaintiff disagreed with the disposition of the motion and case at that time he should have promptly appealed.

As a second ground of decision the Court holds that all of Plaintiff's various claims, discussed *infra*, including but not limited to the alleged failure to find specific promotional deficiencies of the Plaintiff does not involve "conduct ... [by the Defendants which] violate[s] clearly established statutory or constitutional rights of which a reasonable person would have known." *Harlow* v. *Fitzgerald*, ... U.S. ...., ..., 50 U.S.L.W. 4815, 4820 (1982). Therefore, the Court finds the individual Defendants are immune from personal liability and should not be "subject ... to the costs of trial or to the burdens of broad-reaching discovery." *Id.* Dismissal before discovery was therefore appropriate.

Returning to the merits of the fifth amendment claim, the Court notes that Plaintiff must initially establish that he has a property interest in that which was allegedly deprived by the government. The record indicates, and Plaintiff does not contest in this action that by the fall of 1979, he had completed 30 years and 30 days total commissioned service in the Army and five years service in the grade of colonel. Accordingly, under 10 U.S.C. § 3851(a), Plaintiff had "absolutely no possible claim of entitlement to [continued] re-employment," *Board of Regents* v. *Roth*, 408 U.S. 564, 578, (1972), after December, 1979, unless he was promoted to a higher grade. It is uncontroverted that the existing "rules or understandings" in the Army are that field-grade officers can be promoted only through selection by a promotion board. Plaintiff was not selected by such a board, and that fact adversely determines his property interest claim. *See Woodward* v. *Marsh*, 658 F.2d 989, 998 (5th Cir. 1981), *cert. denied*, ... U.S. ...., (1982), (holding that an Army Reserve commissioned officer "has no reasonable expectation of continued employment and thus no property interest protected by the due process clause." Citing *Sims* v. *Fox*, 505 F.2d 857 (5th Cir. 1974) (en banc), *cert. denied*, 421 U.S. 1011 (1975)).

Plaintiff seeks to prevent the application of this conclusion of law by claiming that the Defendants did not follow applicable Army Regulations, thus depriving him of either a property interest or a promotion decision free of arbitrary and capricious reasoning. Plaintiff's first claim is that no notice of his receiving a waiver of required command experience for assignment to a brigadier general's position was included in his personnel file before the file was reviewed by the Board which considered him for promotion. Two years experience in the command of troops at batallion or higher level is a requirement for promotion to brigadier general *or* for assignment to a brigadier's position. Army Regulation (AR) 135-156 ¶ 3-1c, 3-4e (1974). This requirement can be waived by the Secretary of the Army. *Id.* In August, 1979, Plaintiff was assigned to a brigadier general position. His lack of command experience was duly waived by the Secretary's designated representative before the date of assignment. It is agreed by the parties that no record of this waiver was placed in the file that went before the Board.

Although Plaintiff claims that this omission violated the terms of "Paragraph 3-1c and Paragraph 3-4e of AR 135-156," he does not point to any language in the Regulation which supports his summary conclusion. As a matter of fact there is no such language. Neither AR 135-156 nor any other regulation or statute identified by the Plaintiff requires the Army to include such waivers in promotion files. Upon further examination it is clear that Plaintiff's claim is derived from the supposition in his complaint that "[i]t may be reasonable to conclude that the Board may have not recommended Plaintiff for promotion based on this lack of evidence in the file." Original Complaint at 6. In other words, because Plaintiff unilaterally finds his proposed procedure more logical or desirable than the

Army's procedure he claims the government has violated the Regulation. He cannot point to regulatory language or other rules to support his interest, and he does not even claim that he understood that the Army would place a notice of the waiver in his file. (He cannot make the latter claim because he reviewed his file before it was submitted to to the Board and made no objection to the absence of the waiver). In short, Plaintiff's claimed property interest in the waiver is "an abstract . . . desire . . . [amounting to] a unilateral expectation . . . [not based on] existing rules or understandings that stem from an independent source . . . ." *Board of Regents* v. *Roth, supra,* at 577.

The Court also finds that the failure by the Army to include notice of the waiver in the promotion file was not an arbitrary or capricious act. It seems clear from reading Chapter 3, AR 135-156 that only the names of officers recommended for promotion are submitted to the Board for selection consideration. Any doubt in this respect is removed by Paragraph 3 of the Secretary's Instructions to the Board, dated 12 October 1979. (Exhibit 7 to Defendant's motion for summary judgment (MSJ) at 29). That Paragraph clearly informs the Board that they "will consider . . . officers assigned to general officer positions . . who have been recommended for promotion . . . ." Accordingly, there could have been no doubt in the minds of members of the Board that Plaintiff's command experience requirement had been previously waived by the Secretary. *See* AR 135-156 ¶ 3-1c, 3-3a(2), 3-4e (only officers with command experience or a waiver of the same can be recommended for promotion). In short, notice of the waiver would have been superflous. Additionally, its absence did not prejudice the Plaintiff. The Instruction Book provided to the Board (Exhibit 10, Defendant's MSJ), informs the members that the command requirement may be waived.

See Instruction Book, Paragraph 4d. Plaintiff was not subjected to an arbitrary or capricious decision making process or to deprivation of property.

Perhaps the most fervent argument contained in the complaint claims the Defendants did not advise the Plaintiff of specific deficiencies which in the Board's opinion were responsible for his not being selected for promotion. Army Regulation 135-156 does not require a promotion board to give reasons, specific or otherwise, for not selecting particular officers. The Plaintiff correctly points out, however, that the Secretary's instructions to the Board did require findings of "the specific ... deficiencies which form the basis for the individual not being recommended for promotion." Pursuant to these instructions the Board "determined that ... [Plaintiff's] record did not reflect the professional qualifications and leadership required for promotion to general officer." *See* Exhibit 3 to Defendants' MSJ at 19. This determination by the Board was approved by the Secretary of the Army. *Id.* at 28. Since only the instructions of the Secretary required specific findings and the Secretary was satisfied with those findings, the Court cannot say that Plaintiff was deprived of any property to which he was entitled.

Again, Plaintiff has failed to allege or show in the voluminous material submitted in this case that he legitimately possessed an understanding that he would be supplied with specific findings of deficiencies. *See Board of Regents* v. *Roth, supra,* at 577. This omission derives not from oversight, but from the fact that no such understanding can be found in the rules or regulations of the Army. *Cf. Perry* v. *Sinderman,* 408 U.S. 593 (1972). Plaintiff can point only to confidential instructions which were given to persons other than himself at the demand

of the Secretary who has decided the findings are satisfactory for his purposes. Plaintiff cannot legitimately claim a property interest in this matter.

Plaintiff also failed to show that the Defendants' manner of complying with the Secretary's instructions was arbitrary or capricious since that compliance was entirely acceptable to the only individual requiring it. Plaintiff apparently finds the list of deficiencies to be non-specific. The Secretary did not. This Court cannot redefine the Secretary's own instructions.

In discussing the various elements of the complaint under the arbitrary and capricious standard the Court assumes that Plaintiff is not requesting substantive review of his qualifications vis a vis those of officers who were selected for promotion. To the extent the complaint can be so read, such relief is foreclosed. A claim " 'in which an officer is asking a court to interfere with the discretionary rating given the officer's performance' " is inappropriate for judicial review. *Woodward* v. *Marsh, supra* at 994.

Several arguable claims remain to be discussed. The Board which met on November 30, 1979, was without power to recommend retention of the Plaintiff in the Army Reserve after December 14, 1979. *See* 10 U.S.C. § 3851. Therefore, the alleged failure of the Board to recommend retention affirmatively or negatively was not the cause of any damage to Plaintiff. Finally, contrary to the claim described in Paragraph VII of the Original Complaint, the Defendants were not required to hear evidence concerning Plaintiff's non-selection for promotion if, in fact, he did not have a proper interest in promotion to the rank of brigadier general. *Board of Regents* v. *Roth, supra.* Because the Court earlier determined that he had no such

interest, that Paragraph adds nothing to the complaint and may be similarly dismissed.

The alleged deprivation of liberty without due process of law is the last claim which remains to be considered. This issue, however, appears to be foreclosed in this Circuit by the decisions in *Woodward* v. *Marsh, supra,* at 998, and *Sims* v. *Fox, supra. See* 5 U.S.C. §§ 552(b)(6), 552a(b). This conclusion is further supported by the Supreme Court's holding in *Bishop* v. *Wood,* 426 U.S. 341 (1976). There the Court held, despite the fact that the Chief of Police and the City Manager were aware of derogatory appraisals of the plaintiff's performance, that he had not suffered a cognizable injury to a liberty interest. Presumably, in that case just as is alleged in this case, the Plaintiff's reputation was diminished *within* the government agency which formerly employed him. Those facts, however, do not support a claim under the due process clause if the unfavorable information is not released to the public. *Id.* at 349. The Court is of the opinion that summary judgment should be granted. *See Houston North Hospital Properties* v. *Telco Leasing, Inc.,* 680 F.2d 19, 22 (5th Cir. 1982); *Woodward* v. *Marsh, supra.*

In reaching this conclusion the Court is not implicitly commenting favorably or unfavorably upon the appropriateness of the Army's decision in this matter. Rather it is simply recognizing that

> [t]he federal court is not the appropriate forum in which to review the multitude of personnel decisions that are made daily by public agencies. We must accept the harsh fact that numerous individual mistakes are inevitable in the day-to-day administration of our affairs. The United States Constitution cannot feasibly be construed to require federal judicial review for every such error. In the absence of any claim that the public employer was motivated by a desire to curtail or

> to penalize the exercise of an employee's constitutionally protected rights, we must presume that official action was regular and, if erroneous, can best be corrected in other ways. The Due Process Clause of the ... [Fifth] Amendment is not a guarantee against incorrect or ill-advised personnel decisions.

Bishop v. *Wood, supra,* at 349-50.

It is, therefore,

ORDERED that Defendants' motion for summary judgment is GRANTED; Plaintiff's motion for summary judgment is DENIED; and the complaint is DISMISSED on the merits.

DONE at Houston, Texas, this 8th day of February, 1983.

Ross N. Sterling
United States District Judge

S-12

IN THE

UNITED STATES DISTRICT COURT

FOR THE SOUTHERN DISTRICT OF TEXAS

HOUSTON DIVISION

SELDON B. GRAHAM, JR., *Plaintiff,* v. THREE OR MORE MEMBERS OF THE SIX MEMBER ARMY RESERVE GENERAL OFFICER SELECTION BOARD OF 30 NOVEMBER 1979, THE SECRETARY OF THE ARMY, AND THE UNITED STATES OF AMERICA REPRESENTED BY THE SECRETARY OF THE ARMY, *Defendants.*	CIVIL ACTION No. H-82-0063

FINAL JUDGMENT

This action came on for hearing before the Court, and the issues having been duly heard and a decision having been duly rendered,

It is ORDERED and ADJUDGED that the Plaintiff take nothing, that the action be dismissed on the merits, and that the Defendants recover of the Plaintiff Seldon B. Graham, Jr. their costs of action.

DONE at Houston, Texas, this 9th day of February, 1983.

ROSS N. STERLING
United States District Judge

IN THE

UNITED STATES DISTRICT COURT

FOR THE SOUTHERN DISTRICT OF TEXAS

HOUSTON DIVISION

SELDON B. GRAHAM, JR.,
Plaintiff,

v.

THREE OR MORE MEMBERS OF THE SIX MEMBER ARMY RESERVE GENERAL OFFICER SELECTION BOARD OF 30 NOVEMBER 1979, THE SECRETARY OF THE ARMY, AND THE UNITED STATES OF AMERICA REPRESENTED BY THE SECRETARY OF THE ARMY,
Defendants.

CIVIL ACTION
No. H-82-0063

ORDER

Pending before the Court is Plaintiff's motion to alter or amend judgment. The motion presents several arguments which will be addressed in turn to the extent considered appropriate.

Plaintiff first complains of Defendants' filing, in Civil Action No. H-80-1321, of a motion to stay operation of Rule 36, Fed.R.Civ.P. It is worthwhile to preface the discussion of these complaints with the observation "that the purpose of [motion] pleading is to facilitate a proper decision on the merits." *Conley* v. *Gibson*, 355 U.S. 41, 48 (1957). The subject requests for admissions are not deemed admitted.

Court records indicate Defendants' motion for stay of the time period applicable to Rule 36 was served on Plaintiff on November 24, 1980. He received and responded to that motion on or before November 26, 1980. Defendants' motion was accepted for filing on November 26, 1980,

because the requirements of local Rule 15A were clearly satisfied, *i.e.*, the motion states on its face that opposing counsel met in person and obviously they were "unable to reach an agreement" concerning whether continued discovery was appropriate during the pendency of the dispositive motions.

The local rule exists only to encourage settlement and to aid the Court in expeditious completion of its work. Plaintiff well knew he had not resolved the matter of the pending motion with Defendants. By November 26, 1980, Plaintiff had notice of Defendants' motion and by January 12, 1981, the date when the Court issued its Memorandum Opinion, there could have been no reasonable doubt that the Court had considered Defendants' motion to stay. Plaintiff does not claim, nor could he claim, that he was unaware of the contents of Defendants' motion — a motion for stay pending ruling on the dispositive motions. Plaintiff should have appealed at that point if he disagreed with the Court's disposition of the requests for admissions and the case as a whole. It was clear then that the Court had not deemed the requests admitted.

The Court concludes pursuant to Rule 36(a), Fed.R.Civ.P., that the requests for admissions were not deemed admitted and Defendants were permitted a "longer time as the court may allow" to respond to the requests. Alternatively, if the Rule did operate, the Court considers Defendants' motion for summary judgment (See memorandum in support thereof, at 43-45, filed September 9, 1982 (date stamped 1980 by error)), to effectively present a motion under Rule 36(b) to permit amendment of the deemed admissions. The Court finds it appropriate for the reasons stated here and in its Memorandum and Order of February 8, 1983, to grant relief from the operation of Rule 36. Such action does not prejudice Plaintiff. His subsequent use in this matter of

the requests for admissions is an attempt to determine this lawsuit on a technicality. Defendants simply cannot be fairly charged with admitting the requests which were apparently if not actually stayed in No. H-80-1321. Plaintiff has not relied on the subject admissions but rather has argued that the requests *should be* deemed admitted. If the requests were unrealistically deemed admitted, this entire suit would make very little sense because it would be premised on the incredible fact that every member of the Board voted for Plaintiff's promotion but inexplicably recommended the contrary.

OFFICER EFFICIENCY REPORT

Whether the Board members should have given more weight to Plaintiff's last efficiency report or rated Plaintiff's ability to perform as a general officer more highly because of the report is an issue that is inappropriate for this Court's review. *Woodard* v. *Marsh*, 658 F.2d 989, 994 (5th Cir. 1981), *cert. denied*, ... U.S. .... (1982). (The answers given there to the four relevant considerations are appropriate answers here also). It is evident from the records of this case that promotion boards review personnel records spanning the entire careers of recommended officers. Obviously, Board members must evaluate the importance of various assignments held by a given officer, rate his performance in each and attempt to predict prospective performance of work that the Army and the officer will be required to undertake in the future. This Court is without the necessary expertise to substitute its judgment for that of the two sets of Board members who have considered Plaintiff's case.

Plaintiff has not pointed to any "existing rules or understandings that stem from an independent source" to sup-

port his claim that a maximum score on one efficiency report entitles an officer to a reasonable expectation of promotion. *See Board of Regents* v. *Roth*, 408 U.S. 564 (1972).

RIGHT TO TRAVEL

The Court finds the right to travel argument unpersuasive. Plaintiff did not raise this issue originally in his complaint. Moreover, he has failed to show that he has standing to raise this claim, *i.e.*, he failed to show that he was unable at any time to hold a command position for one or two years as required by AR 135-156 ¶ 3-1c (1974), because of frequent personal travel. If the regulation under attack is constitutional as applied to Plaintiff and it has not unreasonably hindered *his* opportunity to travel, then he is without standing. *Young* v. *American Mini Theaters, Inc.*, 427 U.S. 50 (1976); *Broadrick* v. *Oklahoma*, 413 U.S. 601, 610 (1973). It is a plaintiff's burden to plead and substantiate the facts establishing standing to pursue a constitutional challenge. *See, e.g., Younger* v. *Harris*, 401 U.S. 37, 42 (1971).

Alternatively, there can be no question but that the Army has a compelling interest in insuring that most of its general officers possess significant command experience or, alternatively, "truly outstanding" records in other fields of endeavor. AR 135-156 ¶ 3-1c. It is important to note that a lack of appropriate command experience is not promotion disqualifying, but may be waived by the Army if the officer has not "had the opportunity to command" because of continual travel. *Id.* Additionally, there is no allegation that a commanding officer may not travel between the states during the course of his command tour. In fact, the regulation does not truly limit the right to travel. It requires only that sometime during a career of travel that an officer gain at least one year's experience commanding

troops. This experience can be obtained without stated limitation in any part of the nation. The subject regulation prescribes a reasonable method of protecting a compelling governmental interest as well as the constitutional interest at issue. It is not unconstitutional.

It is, therefore,

ORDERED that Plaintiff's motion to alter or amend judgment is DENIED, and this Order is adopted in *toto* as a supplement to the Memorandum and Order filed in this cause on February 8, 1983.

DONE at Houston, Texas, this 31 day of March, 1983.

Ross N. Sterling
United States District Judge

END OF DOCUMENT